that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Id*. at 509. In *Fugett v. Commonwealth*, 250 S.W. 3d 604 (Ky. 2008), the Court held that the trial court erred in failing to dismiss a juror for cause who would consider the age of the defendant only where he was 10, 11, or 12. The juror also stated that he would consider low intelligence and a bad family life "but they would not have much effect on his opinion. Nor did he believe that factors such as the use, or abuse of alcohol should be considered." *Fugett* provides support for questioning on the specific mitigation involved in the case.

As a starting point, a prospective juror must be willing to consider and give effect to all statutory mitigation listed in KRS 532.025. In order to uncover the inability to consider statutory mitigation, questions specific to that mitigation must be asked. For example, KRS 532.025(2)(b)(7) requires a juror to consider intoxication as a mitigating factor. To discover whether a juror is mitigation impaired on this mitigating circumstance, a question such as this must be asked: "How would you use evidence of a person's intoxication on alcohol or drugs in arriving at a penalty decision?"

Jurors cannot sit if they disagree with certain mitigating circumstances. The Capital Jury Project has revealed startling facts about jurors who have sat on capital cases. Many of them do not believe that specific statutory mitigating circumstances are mitigating. 90% of jurors who sat on capital cases do not consider drug addiction as mitigating. 86% do not agree that intoxication is mitigating. 43% do not believe that a history of mental illness is mitigating. Clearly, jurors who harbor these opinions are excludable for cause.

Jurors must be able to consider and give effect to specific nonstatutory mitigating circumstances. It is not sufficient to consider and give effect only to the eight statutory mitigating circumstances. In addition, prospective jurors must be willing to consider and give effect to all mitigation which is of constitutional dimension. From *Lockett v. Ohio*, 4038 U.S. 586 (1978), onward, the Supreme Court has defined mitigation from an Eighth Amendment perspective, stating what must be allowed into evidence. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court stated that a jury must consider mitigation of a defendant's youth and troubled family background and give it "effect." *Brewer v. Quarterman*, 550 U.S. 286 (2007) expanded that requirement to one of giving the mitigating evidence "full effect." See also *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007). A troubled childhood and emotional disturbance was viewed as mitigation in *McCoy v. North Carolina*, 494 U.S. 433 (1990). In *Hitchcock v. Dugger*, 481 U.S. 393 (1987) the defendant's having inhaled gas fumes to the point of passing out, coming from an impoverished family background, and having his father die of cancer was said to be mitigating. Adjustment to prison life was said to be mitigating in *Skipper v. South Carolina*, 476 U.S. 1 (1986). *Penry v. Lynaugh* 492 U.S. 302, (1989) made it clear that "'defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." None of these opinions, interpreting what is required by the Eighth Amendment, have any impact unless jurors are asked during voir dire whether they can consider specific mitigation and give it full effect.

Mitigation is to be decided by each juror, not the jury as a whole. Jurors need to understand that mitigation does not have to be unanimous in order for it to be considered. *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990). Each juror must consider evidence in mitigation and give it the effect that they believe it deserves. Jurors will need to be educated individually on this requirement. A question such as this is appropriate: "How will you use evidence of alcoholism in your penalty decision?" "What if you believe alcoholism is something that is important for your decision, but the other jurors do not agree?" "The law is that each juror has a right to give whatever weight she wants to a particular piece of mitigating evidence. What do you think about that?"

Jurors also must may consider any factor that they determine is mitigating. Jurors will not understand that without the court and counsel explaining that to them. They may personally react to the defendant, the facts in the case, or anything else that brings about a mitigating reaction.

No nexus is required between mitigation and the crime. *Tennard v. Dretke*, 542 U.S. 274 (2004) makes it clear that mitigation does not have to have a nexus with the crime. Mitigation may be virtually anything that relates to the defendant, his family upbringing, his character, how he relates to family members, or his history. For example, the Court stated that "the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter" in a case looking back to the defendant's Korean War experiences. *Porter v. McCollum*, 558 U.S. 30 (0.0.2009).

It is important for the juror to understand that they must base their penalty decision on the mitigation they hear. This is counterintuitive. The jurors naturally believe they are to base their decision on the facts of the case, the heinousness of the crime, the intentionality of the crime, and the lack of

remorse. Unless the trial court and the parties do something to educate the jurors differently, unqualified jurors will be allowed to sit. Some possible questions to ask include: "How will you use evidence you hear about mental illness in making your penalty decision?" "How do you understand the penalty decision process as it has been explained to you?" "Why is it important to consider evidence of the defendant's fetal alcohol syndrome when making a penalty decision?"

Mitigation does not have to be proven beyond a reasonable doubt. Jurors also need to understand that mitigation does not have to be proven beyond a reasonable doubt.

Jurors need to understand that this is their individual decision. No one can suggest to the jury that their decision is merely a recommendation to the trial court. Many of them believe that the trial court is the ultimate sentencer, or that she can correct their errors. Many jurors believe that they are merely making a recommendation. See *Caldwell v. Mississippi*, 472 U.S. 320 (1985). All the parties must do everything they can to imbue the juror with the solemnity of their decision. Questions may include:

"Some people believe that the jury simply makes a recommendation and that other people do the sentencing. Other people believe that the jury makes the ultimate penalty decision. What do you think?" "Who do you believe makes the final decision about whether someone will live or die?" "What do you think happens once a jury makes a verdict?"

Misunderstanding about the length of time the client will serve should be clarified. There is a misconception that has been prevalent for many years that persons sentenced to life in prison get paroled after serving just a few years, generally six or eight years. This must be addressed in voir dire. *Shields v. Commonwealth*, 812 S.W.2d 152 (Ky. 1991) allows for counsel to question the jurors on the full range of penalties, and should apply as well to a full voir dire on the time people have to serve on particular sentences, parole, etc. Questions that are appropriate could be: "One of the possible penalties for an intentional murder is life in prison. How much of the time would a person have to serve before being eligible for release on parole?" "How long do persons have to serve in Kentucky before being released on parole?" "If you were to give a sentence of life without parole, what is your understanding of what that means?" "What do you believe a life without parole sentence means?"

The Magic Question. In *Montgomery v. Commonwealth*, 819 S.W.2d 713 (1992), the Court ended the practice of seating jurors who were able to answer the "magic question" regarding many issues, in that case pretrial publicity. The Court said that, "[o]ne of the myths arising from the folklore surrounding jury selection is that a juror who has made answers which would otherwise disqualify him by reason of bias or prejudice may be rehabilitated by being asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the case instead based solely on the evidence presented in court and the court's instructions. This has come to be referred to in the vernacular as the "magic question." But, as Chief Justice Hughes observed in *United States v. Wood*, 299 U.S. 123, 146 (1936), "[i]mpartiality is not a technical conception. It is a state of mind." A trial court's decision whether a juror possessed "this mental attitude of appropriate indifference" must be reviewed in the totality of circumstances. It is not limited to the juror's response to a "magic question."…There is no "magic" in the "magic question." It is just another question where the answer may have some bearing on deciding whether a particular juror is disqualified by bias or prejudice, from whatever source, including pretrial publicity. The message from this decision to the trial court is the "magic question" does not provide a device to "rehabilitate" a juror who should be considered disqualified by his personal knowledge or his past experience, or his attitude as expressed on voir dire. We declare the concept of "rehabilitation" is a misnomer in the context of choosing qualified jurors and direct trial judges to remove it from their thinking and strike it from their lexicon."

Jurors who have heard a great deal about the case, who have formed an opinion about the defendant's guilt, cannot be rehabilitated by promising to set aside their opinions and be fair. On the other hand, *Witt*, *Morgan*, and *Lockhart* all call upon counsel to probe jurors sufficiently to determine whether they may be excused for cause, or whether a cause challenge by the prosecution would be erroneous. *Montgomery* means that biased jurors must be excluded for cause. At the same time, counsel must insist that the *Witherspoon/Witt* line of cases mean that counsel must be allowed to conduct a thorough and probing voir dire on penalty and mitigation qualification.

The interplay between *Montgomery* and capital jury selection is fluid. *Mabe v. Commonwealth*, 884 S.W.2d 668 (1994) states that "*Montgomery* directs attention to the totality of the evidence on voir dire with the comprehensive question being whether the juror has a mental attitude of 'appropriate indifference.' *Montgomery* rejects the idea that a magic question may be asked which can rehabilitate a juror whose answers to voir dire questions demonstrate a pervasive prejudice. On the other hand, *Montgomery* does not eliminate trial court discretion or absolve the trial court of its duty to evaluate the answers of prospective jurors in context and in light of the juror's knowledge of the facts and his understanding of the law…A per se disqualification is not

required merely because a juror does not instantly embrace every legal concept presented during voir dire examination. The test is not whether a juror agrees with the law when it is presented in the most extreme manner. The test is whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Id*. at 671.

Conclusion. It is important to emphasize the importance of voir dire in a capital case. Everyone involved should want unbiased jurors who understand the process and the use of aggravating and mitigating circumstances. And all should remember that "trial courts should tend toward exclusion of a conflicted juror rather than inclusion, and where questions about the impartiality of a juror cannot be resolved with certainty, or in marginal cases, the questionable juror should be excused. " *Ordway v. Commonwealth*, 391 S.W.3d 762, 780 (Ky. 2013).

Symposium on the Death Penalty: Reforming a Process Fraught With Error

John H. Blume, Sheri Lynn Johnson, and A. Brian Threlkeld
PROBING "LIFE QUALIFICATION" THROUGH EXPANDED VOIR DIRE
29 Hofstra L. Rev. 1209 (2001)

Data from Kentucky illuminate this disheartening picture. Almost 30% of persons who serve as capital jurors in Kentucky reported that they would automatically vote for the death penalty upon conviction for capital murder.

See Ronald C. Dillehay & Marla R. Sandys, Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification, 20 Law & Hum. Behav. 147, 158-59 (1996) (relating findings, based on survey of 148 Kentucky felony jurors, that 28.2% of the respondents who would not be disqualified as jurors under the Witt disqualification standard would nonetheless always give the death penalty in cases involving intentional murder).

Waste in Kentucky Capital Prosecutions is Significant

2011 Statewide Audit: Implement Charging Recommendation Process to Reduce Waste, Abuse, and Error

By Ed Monahan

H]owever strongly one may favor the death penalty in principle, its propriety in practice depends on our ability to restrict its use to the worst of our criminals and to impose it in a nondiscriminatory fashion.

-Walter Berns, Defending the Death Penalty, 26 Crime & Delinq. 503, 511 (1980).

High cost

Ed Monahan
Public Advocate

Prosecuting a homicide in Kentucky as a death penalty case greatly increases the cost to the court, prosecution, defense and taxpayer. It substantially delays the ultimate resolution of the case.

The Kentucky death penalty was reinstituted in December 1976. There are 34 persons on Kentucky's death row. There have been three executions since 1976, and two of them were voluntary, Edward Lee Harper, Jr. on May 25, 1999 and Marco Allen Chapman on November 21, 2008. The only involuntary execution was Harold McQueen, Jr. on July 1, 1997. Hundreds of millions of dollars have been spent on the Kentucky death penalty process.

High error rate

The error rate is strikingly high. As of December 2011, of the 78 people sentenced to death in Kentucky since 1976, 50 have had a death sentence overturned on appeal by Kentucky or federal courts. This is an error rate of more than 64%. These 50 reversals over 35 years is an average of more than one reversal per year. Between 2008 and 2014, there were five reversals of death sentences. Since 1920, 10 KY Governors have granted clemency to 37 persons sentenced to death. Governor Patton commuted the death sentence of Kevin Stanford on December 8, 2003. Governor Fletcher commuted the death sentence of Jeffrey Leonard on December 10, 2007.

Few sentences of death

The most common result of a capital prosecution is a sentence less than death. Between 1976 and 2011 there have been 78 people sentenced to death in Kentucky, about 2 per year. This rate has continued to decrease in recent years. Since 2006, there have only been five death sentences in Kentucky:

- None from December 2006 to February 2010
- Two in 2010
- One in 2011
- One in 2012

- None in 2013
- One in 2014

Imprudent prosecution of marginal cases

The imprudent prosecution of a marginal case as capital when it is not a serious capital case is a significant problem in Kentucky. Prosecutors have the discretion to decide whether to prosecute a capital-eligible case as a death penalty case or not. Some prosecutors decide always to prosecute a capital-eligible case as a death penalty case, in effect exercising no discretion. However, other prosecutors are careful only to prosecute a case as a death penalty case if it merits that resource-intensive procedure. The waste these overbroad prosecutions causes occurs in Kentucky in a variety of ways across the state.

For instance, in the 2010 Raymond Clutter capital case in Boone County the parties conducted five days of capital voir dire before the Court declared a mistrial because of an opening statement error of the prosecutor. Thereafter, the prosecutor decided not to seek the death penalty upon retrial.

There are a significant number of death penalty prosecutions that proceed to trial but still result in non-capital sentences and even in jury verdicts that the defendant is not guilty of murder. Some examples of extensive wasteful death penalty cases that went to trial with death as a possible sentence but resulted in acquittal, reckless homicide or manslaughter verdicts are:

- **Kendrick Hunt** (Hickman County 12-CR-0002) charged with robbery and/or complicity to robbery, murder and/or complicity to murder, kidnapping and/or complicity to kidnapping; acquitted on all robbery and murder charges; guilty of wanton endangerment 1st and unlawful imprisonment 1st. Sentence of 10 years, nonviolent.
- **Robert Yell** (Logan County 04-CR-00232) charged with arson 1st, murder, attempted murder, assault 3rd, assault 4th, resisting arrest, menacing, terroristic threatening, alcohol intoxication, PFO 1st. Convicted of arson first, manslaughter 2nd, assault 1st (instead of attempted murder), AI and PFO 2nd. Sentence of 56 years.
- **Joshua Cottrell** (Hardin County 03-CR-00465) charged with murder, first-degree robbery, tampering with physical evidence and second-degree persistent felony offender. After a jury trial, he was convicted of second-degree manslaughter, tampering with physical evidence, theft by unlawful taking over $300, and being a second-degree persistent felony offender. He was sentenced to 20 years in prison.
- **Scot Gaither** (Daviess County 02-CR-446) charged with murder, kidnapping victim death, robbery 1st, tampering with physical evidence. Convicted of manslaughter 1st, kidnapping victim death, theft by unlawful taking, and tampering. Mr. Gaither received an illegal sentence of LWOP, which has been vacated in a post-conviction action, but due to continued litigation in federal court, he has not yet been resentenced.
- **Wesley Meeks (**Greenup County 01-CR-155) charged with Burglary 1st, 3 counts of theft by unlawful taking over $300, sodomy 1st, and murder. Convicted by a jury of second-degree manslaughter, first-degree burglary, and theft by unlawful taking (felony). He was sentenced to 35 years in prison.
- **Larry Osborne** (Whitley County 98-CR-00006-001) charged with murder, arson, robbery, burglary, and theft. Reversed on appeal, *acquitted of all charges.*

Fayette County Capital Prosecutions where Defendant was Acquitted of Murder

- **Adrian Benton** (Fayette County 06-Cr-01043-001) charged with murder, 3 counts robbery 1st, 2 counts

Kentucky Conservatives against the Death Penalty

John David Dyche

In a February 18, 2014 article, John David Dyche wrote:

"The conservative case against the death penalty has come to Kentucky. It is a compelling one.

Two Republican state representatives, David Floyd of Bardstown and Julie Raque Adams of Louisville, joined with six Democrats, including some of the chamber's most liberal members, to sponsor House Bill 330. They want to abolish the death penalty and replace it with life imprisonment without parole for both inmates already sentenced to death and others going forward.

Some may reflexively think that eliminating the death penalty undermines conservative support for law and order and being tough on crime. It need not, especially if citizens have confidence that sentences of life in prison without parole are firmly administered without allowing inmates too many creature comforts and recreational privileges.

To paraphrase Victor Hugo, there is nothing so powerful as an idea whose time has come.

Abolition of the death penalty is such an idea, and its time has come for conservatives. Kentuckians owe a debt of gratitude to the conservative leaders like Floyd and Adams who are taking action on the issue."

wanton endangerment 1st, tampering, PFO 2d. Convicted of complicity to manslaughter 2d, two counts robbery 1st, complicity to robbery 1st, wanton endangerment 1st, wanton endangerment 2nd, PFO 2nd, acquitted of tampering. Sentence of 27 years. Death was excluded after completing voir dire, but before the jury was sworn in.

- **Sam Duff** (Fayette County 01-CR-00869) charged with murder, violation of a DVO aggravator. Convicted of manslaughter 1st. Sentence of 19.5 years.
- **Carlos Cortez** (Fayette County 99-CR-00369-002) charged with murder, robbery 1st, and burglary 1st, *acquitted on all charges.*
- **Myron Wilkerson** (Fayette County 98-CR-00631-002) charged with murder, burglary 1st, robbery 1st. Convicted of manslaughter 2nd, 10 years, acquitted of burglary, guilty of robbery 1st, 20 years
- **Gene Tapp Perry** (Fayette County 97-CR-00741) charged with murder, rape 1st, and PFO 1st. Acquitted of rape 1st. Convicted of manslaughter 1st, and PFO 1st. Life sentence.
- **Mark Dixon** (Fayette County 95-CR-00577) charged with murder, robbery 1st, 3 counts of wanton endangerment 1st, *acquitted on all charges.*
- **Earl Cheeks** (Fayette County 90-CR-00049-002) charged with murder and robbery 1st, convicted of manslaughter 2nd, acquitted of robbery. Sentence of 20 years.
- **C.H. Brown** (Fayette County 87-CR-00506-001) charged with murder and robbery 1st, acquitted of murder, Convicted of robbery. Sentence of 20 years.

Jefferson County Capital Prosecutions where Defendant was Acquitted of Murder

- **Nashawn Stoner** (Jefferson County 98-CR-02446) charged with murder and two counts of Robbery 1st, *acquitted on all charges.*
- **Donnez Porter** (Jefferson County 97-CR-01951) charged with two counts of murder, robbery 1st, assault 1st, *acquitted on all charges.* (Motion to exclude death penalty pretrial due to prosecutorial misconduct was denied.)

Jefferson County Capital Prosecutions where Notice of Aggravating Factors was Filed then Death Excluded by Prosecution

- **Taiwan Lewis** (09-CR-002874) charged with two counts of Murder, 2 counts Attempted Murder and 2 counts Assault, Notice of Aggravating factors filed 12/10/2009, and amended shortly before trial so as not to include death. Defendant was convicted and sentenced to life. Case is on appeal.
- **Gary Bond** (10-CR-001550) charged with Murder and Sodomy, Notice of Aggravating factors filed 10/29/2010, and amended shortly before trial so as not to include death. Defendant was convicted and sentenced to life. Case is on appeal.
- **Conrai Kaballah** (11-CR-002821) charged with 2 counts of Murder, Notice of Aggravators filed 10/05/2011 and amended shortly before trial so as not to include death. Defendant was convicted and sentenced to life. Case is on appeal.

Jefferson County Capital Prosecutions where at Trial for Murder Defendant was Found Guilty of Manslaughter

- **Isiah Fugett** (04-CR-000391) charged with 2 counts of Murder, 1 count of Robbery, Notice of Aggravating factors filed 03/02/2005. Defendant was convicted by

Representative David Floyd (right), a Republican from Bardstown, and **Senator Gerald Neal** (left), a Democratic from Louisville, testify on abolishment of the death penalty at the August 1, 2014 hearing before the Interim Joint Judiciary Committee in Paducah KY. In the 2015 session, Rep. Floyd has introduced HB 82, an Act abolishing the death penalty and replacing it with life without parole. Sen. Neal has filed SB 15, an Act to abolish the death penalty and replace it with life without parole, and SCR 11 establishing a task force to study the costs to the state and local governments related to administering the death penalty in all phases of the criminal justice system and the number and outcomes of death-eligible cases; require the task force to submit a report to the Legislative Research Commission by December 1, 2015. Representative Floyd has filed a similar resolution, HCR 30.

Picture courtesy of Pat Delahanty, Riverbirch Productions

the jury of Manslaughter, Acquitted of Robbery. Case was reversed on appeal and settled before retrial.

- **Adam Barker** (07-CR-000691) charged with Murder, Attempted Murder and Criminal Mischief, Notice of Aggravators filed 08/15/2007, convicted by jury of Manslaughter (case was reversed, retried, and the defendant was again convicted of manslaughter).

Jefferson County Capital Prosecutions where Prosecution was Withdrawn or the Case Amended to Class D at or on Eve of Trial

- **Andrew Cochran** (07-CR-002782) charged with Murder, Robbery and Burglary, Notice of Aggravating factors filed 10/08/2007. After nearly a week of individual voir dire and all the usual pre-trial preparation and expense, the case was settled for credit for time served (almost three years) on facilitation to Murder, Robbery and Burglary.
- **Commonwealth v. John Warren Noble** (10-CR-00029) Defendant was indicted for a "cold case" murder and robbery and Notice of Aggravating Factors was filed. After the defendant spent nearly a year in jail, the case was dismissed on the literal eve of trial because the prosecution did not believe it had enough to proceed against him. The prosecution fought harder to resist a bond reduction motion than anything else in the case.

2011 Kentucky Capital Audit Criticizes Prosecution Charging Process

A 2011 Kentucky specific Audit, the American Bar Association's *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report* (December 2011), uncovered major deficiencies in the way the death penalty has been implemented in Kentucky since 1976. See: http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments/kentucky.html

The statewide Study audited and evaluated Kentucky procedures and practices against national ABA capital punishment best practice protocols. The comprehensive 438 page Audit Report considered all death penalty cases prosecuted in Kentucky since 1976 and makes a series of critically important Findings and Recommendations to address the problems identified with the way the death penalty is administered in our state. The 2011 Audit focuses on fairness and accuracy in capital cases. The Assessment team, as well as the ABA, took no position with regard to whether or not the death penalty should be abolished. It was only concerned with its proper administration. The 2011 Program Audit recommended changes which must be made to eliminate waste, abuse and error.

The Kentucky Assessment Team consisted of two retired Kentucky Supreme Court Justices, a former chair of the House Judiciary Committee, and distinguished law professors and bar leaders. Over two years, it conducted the most extensive evidence-based analysis of the manner in which the death penalty is administered in Kentucky in the history of the Commonwealth. The 2011 Report identified problems in Kentucky's charging process:

> "**Inconsistent and Disproportionate Capital Charging and Sentencing** (Chapter 5) With fifty-seven Commonwealth's Attorneys offices in Kentucky, there are conceivably fifty-seven different approaches to the decision to seek capital punishment. In some instances, it appears that the Commonwealth's Attorney will charge every death-eligible case as a capital case. While the vast majority of Commonwealth's Attorneys may seek to exercise discretion in death penalty cases to support the fair, efficient, and effective enforcement of law, there is no mechanism in place to guide prosecutors in their charging decisions to support the even-handed, nondiscriminatory application of the death penalty across the Commonwealth." Id. at v.

The 2011 Audit explained that, "Kentucky imposes no requirement on Commonwealth prosecutors to maintain written policies governing the exercise of prosecutorial discretion in capital cases, nor must prosecutors maintain policies for evaluating cases relying upon eyewitness identification, confessions, or jailhouse snitch testimony - evidence that constitutes some of the leading causes of wrongful conviction. Death sentences imposed in cases in which the prosecution has significantly relied upon this sort of evidence underscores the need for prosecutors to adopt policies or procedures for evaluating the reliability of such evidence.

"While the vast majority of prosecutors are ethical, law-abiding individuals who seek justice, our research revealed inefficient and disparate charging practices among some Commonwealth's Attorneys, as well as instances of reversible error due to prosecutorial misconduct or error in death penalty cases. In addition, the large number of instances in which the death penalty is sought as compared to the number of instances in which a death sentence is actually imposed calls into question whether current charging practices ensure the fair, efficient, and effective enforcement of criminal law. This places a significant burden on Commonwealth courts, prosecutors, and defenders to treat as capital many cases that will never result in a death sentence, taxing the Commonwealth's limited judicial and financial resources. In 2007, for example, Kentucky's public

defender agencies reportedly undertook representation in ninety seven death penalty cases. However, in the over thirty years since Kentucky reinstated the death penalty, Kentucky courts have sentenced to death only seventy-eight defendants and only three executions have taken place in the Commonwealth. There is also geographic disparity with respect to capital charging practices and conviction rates in Kentucky. Since 2003, fifty-three percent of Fayette County murder cases have gone to trial compared to twenty-five percent in Jefferson County." Id. at xxi.

2011 Audit Charging Recommendation

To address the disparity and the waste, the American Bar Association's Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report (December 2011) made the following recommendation: "Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law." Id. at 147-152.

US DOJ Protocol

The type of charging process recommended by the ABA is already working at the national level. The United States Department of Justice has internal procedures governing death penalty cases. They are found at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm.

To "accelerate decision times and achieve resource and cost savings for our prosecutors, the courts, and defense counsel in cases in which the death penalty clearly will not be sought," the US Department of Justice's protocol requires a process to decide deliberately whether to proceed with a capital-eligible case as a death penalty case or not with most decisions being not to seek death. Attorney General Holder stated in an April 7, 2014 DOJ Memorandum that "the Department decides not to pursue the death penalty in the vast majority of cases that contain death-eligible charges."

Jefferson County Charging Practice Changes under New Commonwealth Attorney

The homicide charging process has changed in Jefferson County. The Jefferson County Commonwealth Attorney has adopted a practice analogous to the US DOJ protocol. This is responsive to the 2011 Audit Recommendation. The waste in Jefferson County has been reduced as the number of death prosecutions has declined based on the individual factors of each case. This new practice resolves cases sooner and benefits the courts, prosecutors, public defenders and taxpayers.

Senator Robin Webb

Senator Robin Webb Introduced SB 86 (2013) and SB 202 (2014) to Implement The ABA Assessment Team Recommendations

Conclusion: High Error, Substantial Waste

These are times of very limited resources. There is a significant waste of resources in the Kentucky capital process that has consequences to other criminal and civil cases because of the disproportionate amount of time and money spent on death penalty cases as compared to other important civil disputes and serious crime prosecutions that also need sufficient preparation and focus on both sides to ensure a safer and fairer community. There are some cases that are serious capital cases, those cases in which the criminal behavior arguably is the worst of the worst. There are other cases that are only technically capital. Our current Kentucky system allows those which are only technically capital to be prosecuted as if they were serious capital cases. To minimize waste – particularly when we know that there is a high risk of reversal in capital cases – the resources spent prosecuting a capital case in Kentucky could be better spent on providing more robust resources to all other cases or to saving the Commonwealth tax dollars.

This is verified by the ABA Kentucky Assessment Team's 2011 Audit. That Audit examined all death sentences imposed in the Commonwealth since 1976. It identified the wasteful nature of the process in Kentucky, "…capital prosecutions occur in far more cases than result in death sentences. This places a significant judicial and financial burden on Commonwealth courts, prosecutors, defenders, and the criminal justice system at large, to treat many cases as death penalty cases, despite the fact that cases often result in acquittal, conviction on a lesser charge, or a last minute agreement to a sentence less than death.

All these factors call into serious question "whether the Commonwealth's resources are well-spent on the current error-prone nature of the death penalty in Kentucky. Budget shortfalls have undoubtedly compounded the problem, resulting in furloughs and budget cuts to the courts, prosecutors' offices, and defenders' offices across the Commonwealth in the last few years. This will inevitably lead to greater risk of error. Finally, actors in the criminal justice system must expend an extraordinary amount of time prosecuting, defending, and adjudicating capital cases as compared to other criminal and civil cases. This contributes to burdensome caseloads and clogged dockets, affecting the quality of justice administered to all Kentuckians." Id. at xii.

The death penalty process in Kentucky has a high cost and a high error rate. It produces few death sentences and has substantial waste. It needs to be fixed or eliminated.

Five Ways to Reduce Error, Waste, and Abuse in Capital Prosecutions in Kentucky

1. Limit when the death penalty can be sought
2. Require timely, complete open file discovery, including requiring an agent of the Commonwealth Attorney to provide all of their information timely
3. Statutorily authorize judge to eliminate death as a possible punishment when legally appropriate
4. Ensure meaningful and comprehensive individual voir dire in death penalty cases to avoid trials with jurors who do not fully qualify in being able to meet their obligations
5. Enact reforms recommended by 2011 independent comprehensive audit of the way capital process in Kentucky is working

For a further explanation of these see *The Advocate* (August 2014) at 7-14 at:

http://dpa.ky.gov/NR/rdonlyres/07572EE0-EC4F-4AAD-8CF8-A938C0397EC0/0/AdvocateAugust2014FINALreduced.pdf

Recommendations of 2011 Kentucky Capital Audit have not been Implemented

The ABA has issued the following information about the Kentucky assessment process that was conducted 2009-2011 by a state-based team that collected and analyzed laws, rules, procedures, standards, and guidelines relating to the administration of capital punishment in the Commonwealth.

The Kentucky Assessment Team determined whether the Commonwealth is in compliance with the ABA Protocols and made Recommendations needed to improve the fairness and accuracy of Kentucky's death penalty system. The Kentucky Assessment Team is comprised of:

- Linda Ewald, Co-Chair, University of Louisville Louis D. Brandeis School of Law, Louisville, KY;
- Michael J. Z. Mannheimer, Co-Chair, Northern Kentucky University Salmon P. Chase College of Law, Highland Heights, KY;
- Hon. Michael Bowling, Managing Partner, Bowling Law Office Middlesboro, KY;
- Allison Connelly, University of Kentucky College of Law, Lexington, KY;
- Hon. Martin E. Johnstone, Kentucky Supreme Court (Retired), Prospect, KY;
- Hon. James Keller, Kentucky Supreme Court (now deceased), Lexington, KY;
- Frank Hampton Moore, Jr., Cole & Moore, P.S.C., Bowling Green, KY; and
- Marcia Milby Ridings, Hamm, Milby & Ridings, London, KY.

The review by the Kentucky Assessment Team, produced troubling findings:

- Of the last 78 people sentenced to death in Kentucky, 50 have had a death sentence overturned on appeal by Kentucky or federal courts. That is an error rate of more than 60 percent.
- Evidence in criminal cases is not required to be retained for as long as a defendant remains incarcerated, and the problem of lost evidence significantly diminishes the effectiveness of a state law that allows post-conviction DNA testing prior to execution. Such lost or missing evidence prevents exonerating innocent people and can prevent apprehension of the guilty.
- There are no uniform standards on eyewitness identifications and interrogations, and many of Kentucky's largest law enforcement agencies do not fully adhere to best practices to guard against false eyewitness identifications and false confessions, two of the leading causes of wrongful conviction nationwide.
- Kentucky public defenders handling capital cases have caseloads that far exceed national averages and salaries that are 31 percent below those of similarly experienced attorneys in surrounding states. Private attorneys who take on representation of a person facing the death penalty make far less than other attorneys contracted by Kentucky to perform legal services on civil matters.
- At least 10 of the 78 people sentenced to death were represented by defense attorneys who were

subsequently disbarred. There are no statewide standards governing the qualifications and training of attorneys appointed to handle capital cases.

- A survey of jurors serving in capital cases found a disturbingly high percentage failed to understand sentencing guidelines before deciding whether or not a defendant should be executed. This is not the fault of the jurors, but rather the failure to adequately instruct the jurors.
- There is no mechanism in place to guide prosecutors in deciding what charges to bring to support the non-discriminatory application of the death penalty across the state.
- Kentucky does not have adequate protections to ensure that death sentences are not imposed or carried out on a defendant with mental disabilities.
- There is a lack of data-keeping throughout the administration of the death penalty in Kentucky, making it impossible to guarantee that the system is operating fairly, effectively and efficiently.

The Team further cautioned that the ongoing fiscal crisis faced by the Commonwealth would undoubtedly lead to greater risk of error in death penalty cases.

The Team issued a series of Recommendations to address the problems identified in the assessment. Among them:

1. Kentucky must guarantee proper preservation of all biological evidence in capital cases, and courts should order DNA testing if the results could create a reasonable probability that a defendant should not have been sentenced to death.
2. Law enforcement training and practices should comport with well-known best practices to promote apprehension of the guilty and prevent conviction of the innocent.
3. Kentucky should adopt statewide standards governing the qualifications and training required of defense attorneys in capital cases.
4. Kentucky should provide additional funding to ensure defense attorneys who represent indigent capital defendants are paid at a rate to ensure the high quality provision of legal services in such complex and demanding cases as a death penalty case.
5. Guidelines governing the exercise of prosecutorial discretion in death penalty cases should be adopted for statewide application.
6. Kentucky should establish a statewide clearinghouse to collect data on all death eligible cases.
7. Kentucky's post-conviction rules and practices should be amended to permit adequate development and consideration by the courts of an inmate's claims of constitutional error.
8. To improve death penalty juror comprehension, the state must revise the jury instructions typically given in capital cases.
9. Shortcomings of the Kentucky Racial Justice Act must be corrected to ensure that the Act serves as an effective remedy for racial discrimination in death penalty cases.
10. Kentucky should adopt legislation exempting the severely mentally ill from the death penalty.

Recommendations have not been implemented

In 2012, there was a hearing in the House and Senate Judiciary Committees on the ABA Kentucky Assessment Team audit. On February 27, 2012, Representative Jesse Crenshaw introduced HCR 173 which would have created a Kentucky Death Penalty Reform Implementation Task Force to develop a strategy to implement the reforms recommended by the American Bar Association's Kentucky Death Penalty Assessment Report. It had Republican and Democrat cosponsors. It passed the House 73-18 but was never called for a vote by the Senate Judiciary Committee. Senator Robin Webb introduced a bill in both the 2013 (SB 86) and 2014 (SB 202) sessions to enact recommended reforms. They were not called for either an informational hearing or for a vote.

The Kentucky Supreme Court Criminal Rules Committee has considered the ABA Assessment Team's recommendations that its Chair deemed relevant to the Judiciary. It has made Recommendations to the Kentucky Supreme Court for further consideration.

Areas of reform addressed in Senator Webb's 2014 SB 202 included:

- improvements in the collection, preservation, and testing of DNA and other types of evidence;
- law enforcement identifications and interrogations;
- crime laboratories and medical examiner offices;
- prosecutorial professionalism;
- defense services;
- the direct appeal process;
- state post-conviction proceedings;
- the clemency process;
- jury instructions;
- matters relating to judicial independence;
- treatment of racial and ethnic minorities; and
- intellectual disability and mental illness issues.

To date, nothing much has changed since the 2011 Audit was released over 3 years ago. None of its Recommendations have been implemented.

For the full information released by the ABA and the complete Audit, see: http://ambar.org/kentucky.

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The Courier-Journal The Courier Journal 12/28/2014 H: Forum (3-lcjbrd2_ky_12-28-2014_b_h_002.pdf.0) Pa

Replace the death penalty with life without parole

By Joseph P. Gutmann, Stephen Ryan and J. Stewart Schneider
Special to The Courier-Journal

Three years ago, a report was released by the American Bar Association revealing serious problems related to fairness and accuracy in the use of the death penalty in Kentucky.

The report followed an exhaustive two-year review of every case in which the death penalty had been imposed in the commonwealth since 1976; the review was conducted by an assessment team of Kentucky attorneys, former Kentucky Supreme Court justices and law school professors. The findings were numerous and troubling. Among them:

» Of the last 78 people sentenced to death in Kentucky, 50 have had a death sentence overturned on appeal by Kentucky or federal courts — an error rate of more than 60 percent.

» At least 10 of the 78 people sentenced to death were represented by defense attorneys who were subsequently disbarred.

» There is no requirement that evidence in criminal cases be retained as long as a defendant remains incarcerated, and the problem of lost evidence significantly diminishes the effectiveness of a state law that allows post-conviction DNA testing prior to execution.

» There are no uniform standards on eyewitness identifications and interrogations, and many of Kentucky's largest law enforcement agencies do not fully adhere to best practices to guard against false eyewitness identifications and false confessions.

» Kentucky public defenders handling capital cases have caseloads that far exceed national averages and


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salaries that are 31 percent below those of similarly experienced attorneys in surrounding states.

» There are no statewide standards governing the qualifications and training of attorneys appointed to handle capital cases.

» Kentucky does not have adequate protections to ensure that death sentences are not imposed or carried out on a defendant with mental disabilities.

» There is a lack of data-keeping throughout the administration of the death penalty in Kentucky, making it impossible to guarantee that the system is operating fairly, effectively and efficiently.

These findings were so disturbing that the assessment team recommended that Kentucky suspend all executions until the issues are adequately addressed. A poll taken when the report was released found 62 percent of likely Kentucky voters statewide supported a temporary halt to executions. The support for a suspension was consistent across the state regardless of gender, geography or party registration.

Unfortunately, there has been no significant change in Kentucky's death penalty law since this sobering report was released, although legislation has been proposed to address some of the problems it identified. Judicial action temporarily stopping executions in Kentucky has been related to concerns about the method of executions and drugs used, not the findings of the ABA team.

Without question, this is a difficult issue, and efforts to "fix" the death penalty in Kentucky will be costly and time-consuming.

But there is one approach that is simpler and less expensive: Abolish the death penalty and replace it with life in prison without parole for convicted offenders.

Studies have shown the cost of numerous legal appeals prompted by death sentences is far greater than the cost of locking up offenders for the rest of their lives. The death penalty also traps the families of victims in a decades-long cycle of uncertainty, court hearings and waiting for an execution that may never come.

The ABA review suggests that the death penalty is broken beyond repair in Kentucky. Replacing it with life without parole is the best approach for our state — removing the possibility that an innocent person will be executed, saving limited tax dollars, protecting public safety and providing certainty and justice to the families of victims.

Joseph P. Gutmann is a former Jefferson County Assistant Commonwealth's Attorney. Stephen Ryan is a retired circuit court judge and former prosecutor, defense attorney and probation and parole officer. J. Stewart Schneider is stated supply speaker of Community Presbyterian Church of Bellefonte and former Commonwealth's Attorney for the 32nd Judicial Circuit in Boyd County.

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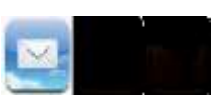

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